Supreme Court, U.S.
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ACTION NO. 87-1750

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM IRR, JR.,

Appellant,

v.

THE COMMONWEALTH OF KENTUCKY,

Appellee.

ON APPEAL FROM THE KENTUCKY COURT OF APPEALS

JURISDICTIONAL STATEMENT

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April 19, 1988

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTION PRESENTED

Whether Kentucky Revised Statute section 189A.110 is violative of the Fifth, Sixth and Fourteenth amendments to the Constitution of the United States, when applied to prevent a suspect charged with driving under the influence of alcohol from contacting an attorney or obtaining a blood test or other exculpatory evidence, for a period of over four hours after his arrest.

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ACTION NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM IRR, JR.,

Appellant,

v.

THE COMMONWEALTH OF KENTUCKY,

Appellee.

ON APPEAL FROM THE KENTUCKY COURT OF APPEALS

JURISDICTIONAL STATEMENT

William Irr, Jr., Appellant, appeals from the final judgment of the Kentucky Court of Appeals dated January 8, 1988 (discretionary review denied by Kentucky Supreme Court February 23, 1988), holding that Kentucky Revised Statute section 189A.110, as applied in this case, is not unconstitutional as being violative of Appellant's due process rights to the effective assistance of counsel and to obtain exculpatory evidence on his behalf.

OPINIONS BELOW

Reprinted in the appendix hereto are the following opinions from the courts below:

A. Opinon of the Kentucky Court of Appeals, entered January 8, 1988, (not published) affirming decision of Campbell County, Kentucky Circuit Court;

B. Order of the Kentucky Supreme Court, (not published) entered February 23, 1988, denying discretionary reivew;

C. Opinion of Campbell County, Kentucky Circuit Court, (not published) entered October 22, 1986, affirming Judgment of Campbell County, Kentucky District Court;

D. Judgment and Sentence of Conviction, Campbell County, Kentucky District Court, entered June 23, 1986.

JURISDICTION

The Opinion of the Kentucky Court of Appeals, entered January 8, 1988, held that Kentucky Revised Statute section 189A.110, as applied to Appellant, did not violate the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. The Kentucky Supreme Court denied discretionary review of this Opinion, by Order entered February 23, 1988.

A notice of appeal to this Court was filed in the Kentucky Court of Appeals on March 25, 1988.

This appeal is being docketed in this Court within 90 days from the entry of the Order denying discretionary review by the Kentucky Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution:

No person shall . . . be deprived of life, liberty or property, without due process of law; . . .

Sixth Amendment, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

Fourteenth Amendment, United States Constitution:

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATUTE FOUND BY COURT BELOW TO BE CONSTITUTINAL

Kentucky Revised Statute section 189A.110:

Any person who is arrested for a violation of KRS 189A.110 and who, upon blood alcohol testing, shows a blood alcohol reading above .15 percent shall be detained in custody at least four (4) hours following his arrest.

* * *

HOW THE FEDERAL QUESTION WAS RAISED

In the District (trial) court, and each subsequent court to which this case was appealed, appellant sought to have his conviction set aside on the grounds that, because he was held *incommunicado* and refused bail for more than four hours after his arrest, he was unable to contact an attorney who could have assisted him in obtaining a blood test, or to place bail and procure such a test himself.

Although appellant claimed throughout the appellate process that K.R.S. 189A.110 was probably unconstitutional, he also asserted that the restrictions of the statute were erroneously applied to him, because he had not had a blood alcohol test (evidence was disputed as to whether he had refused one), and therefore no legislative authority for his four hour hold existed. However, the Kentucky Court of Appeals explicitly applied the statute to him, in the process finding that K.R.S. 189A.110 was not incompatible with the United States Constitution, and rejecting Appellant's federal constitutional claim.

STATEMENT OF THE CASE

Appellant was arrested on the charge of driving under the influence of alcohol on August 27, 1985 at approximately 2:40 a.m. and taken to the Newport, Kentucky police station. There, depending upon the testimony, he either refused, or was denied the opportunity to take a breathalyzer test. He requested the opportunity to call an attorney during the booking procedure, but was told that he would have to wait until he got to jail. After the booking process, Appellant was taken to the county jail and lodged, where he requested of the jailer that he be allowed to take a breathalyzer test. The jailer explained that this would have had to be done by the arresting officer. Appellant then requested to call an attorney. He was informed by the jailer that he could make no call until morning, because the telephones to be used by arrestees were turned off until morning.

Appellant then requested release on bond, and was informed by the jailer that there was a mandatory 4 hour holding period before he would be permitted to obtain release on bond, thereby applying to Appellant the constraints set out in KRS 189A.110. As soon as Appellant was permitted to use the telephone the next morning, he was able to make bond.

Appellant asserted in the trial court that, had he been able to obtain either a telephone call to an attorney or release on bond promptly, he could have, in person or through the attorney, made arrangements to have his blood alcohol content tested, either at a nearby medical facility or at the jail if release was not possible. Such a blood test would have constituted crucial corroborating evidence of Appellant's testifying pharmcologist that, based on Appellant's testimony as to the quantity of alcohol he consumed, his blood alcohol content would have been only about ¼ the presumptive level for intoxication. By the next morning, after the extensive delay caused by the incommunicado hold, such a test would have been meaningless.

At trial on May 14, 1986, Appellant's motion to dismiss on the grounds of denial or destruction of exculpatory evidence

was overruled. The Appellant was found guilty of driving under the influence, and a fine of $250.00 and service fee of $150.00 was imposed by the jury. The judgment and sentence entered pursuant thereto was subsequently upheld by the Campbell County, Kentucky Circuit Court, and the Kentucky Court of Appeals. Discretionary review thereof was denied by the Kentucky Supreme Court on February 23, 1988.

In its opinion affirming the judgment of conviction, the Kentucky Court of Appeals found that, although Appellant did not take a breathalyzer test and therefore did not specifically fall within the wording of KRS 189A.110, which applies to individuals who have registered a blood alcohol test result of more than .15 percent, the statute nevertheless should be applied to Appellant. The court rejected Appellant's assertions that the statute, as applied to him, deprived him of his rights to due process and the effective assistance of counsel.

THE QUESTION PRESENTED IS SUBSTANTIAL

While this court's treatment of the subject of effective assistance of counsel and due process has been extensive, this case raises the important issue of whether a criminal defendant's right to obtain and preserve exculpatory evidence on his own behalf, or to have the assistance of an attorney in doing so for him, may be abridged merely because such defendant may not have fully cooperated with law enforcement officers who are attempting to convict him. It underscores the importance of why, in driving under the influence cases, that right must not be abridged in the crucial few hours following arrest, where delay would result in destruction of exculpatory evidence crucial to a fair trial.

The right of effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution at each stage of the proceedings which are deemed to be a "critical stage" substantially affecting a defendant's right to a fair trial, whether or not that stage is formal, or in court. *United States* v. *Wade*, 388 U.S. 218 (1967).

This right has been dealt with in the context of driving under the influence cases extensively across the country, but with conflicting and confusing results. The Texas Court of Appeals, in *Forte* v. *State*, 686 S.W. 2d 744, 753 (Tex. App. 2 Dist. 1985), reviewed many states' varying approaches with respect to the right to contact a lawyer before deciding whether to take a blood alcohol test. Recognizing the custodial nature of the situation, the importance of the decision, and the far-reaching effect it may have upon an accused's trial, that court found that "it stretches reason to say this is not a critical stage of the pretrial proceeding." *supra* at 754.

Yet the decision of the Kentucky Court of Appeals, appealed from herein, would allow the prosecution to deprive an accused of access to an attorney, not just with respect to the decision to take the alcohol test, but for any and all purposes for which an attorney might assist in the crucial few

hours after arrest. Its broad application of Kentucky Revised Statute section 189A.110 permits an accused to be held incommunicado, without the ability to contact counsel or others in the outside world, until there is effectively no exculpatory evidence to preserve. Such an incommunicado hold not only deprives the arrestee of the assistance of counsel, but of the ability to make arrangements on his own for the preservation of evidence, or to contact others whose observations of the accused would provide important corroborating evidence of his physical state.

In cases with closely analogous factual situations, the necessity of an accused's ability to communicate with counsel and the outside world during the post-arrest period has been repeatedly upheld. See *State of Washington* v. *Fitzsimmons*, 93 Wash 2d 436, 610 P. 2d 893 (1980), where the court observed that the period immediately after the arrest is a critical stage in driving under the influence cases because of the unique character of the evidence to be obtained, since it must be obtained immediately or lost; *In re Newbern*, 175 Cal. App. 2d 862, 1 Cal. Rptr. 80 (1959), and *In re Martin*, 58 Cal. 2d 509, 24 Cal. Rptr. 833, 374 P. 2d 801 (1962), where arresting officers refused to allow an accused to bring in a private physician at his own expense to have a sample of his blood taken. In each case, although the courts recognized that law officers need not assist the accused in obtaining an attorney or in his own efforts to preserve evidence, any attempt to thwart or interfere with those efforts constituted a violation of due process.

Although the judges below expressed the belief that Appellant had refused a breathalyzer test, such a finding does not affect these rights. It is universally acknowledged that the blood test sought by Appellant is a more accurate measure of blood/alcohol content than a breathalyzer. But more importantly, Appellant was deprived of an *independent* test, administered not by the officer seeking to convict him, but by an independent doctor or technician with no interest in the outcome of the case. And while a breathalyzer "refusal" may

have adverse consequences on a person's driving privileges, the Fifth Amendment to the United States Constitution mandates that cooperating with the police in their efforts to convict shall not be a precondition to the exercise of an accused's other rights.

CONCLUSION

The opinion of the Kentucky Court of Appeals, affirming the conviction of Appellant on the charge of driving under the influence of alcohol, should be reversed. Because Appellant was deprived of possible exculpatory evidence, which was destroyed by the passage of time, the error cannot be remedied by a new trial. For this reason, remand is not appropriate.

Respectfully submitted,

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APPENDIX

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

86-CA-2821-DG

WILLIAM IRR
APPELLANT

v.

COMMONWEALTH OF KENTUCKY
APPELLEE

ON DISCRETIONARY REVIEW FROM CAMPBELL CIRCUIT COURT
HONORABLE GEORGE T. MUEHLENKAMP, JUDGE
ACTION NO. 86-X-014

AFFIRMING
(OPINION RENDERED: January 8, 1988; 10:00 a.m.)
NOT TO BE PUBLISHED

BEFORE: HOWERTON, Chief Judge; COMBS and WEST, Judges.

HOWERTON, CHIEF JUDGE. William Irr appeals from his conviction in the Campbell District Court for driving under the influence. As grounds for reversal, Irr asserts that he was denied bail for four hours under KRS 189A.110, which deprived him of effective assistance of counsel and his due process right to a fair trial. The Campbell Circuit Court affirmed Irr's conviction. We agree with the circuit court's decision and affirm.

William Irr, an Illinois resident, was arrested for driving under the influence of alcohol in Newport, Kentucky, on August 22, 1985, at approximately 2:40 a.m. He was tried by a jury and sentenced to a $250 fine. He appealed to the

Campbell Circuit Court, which affirmed the judgment. We granted discretionary review on the issue of the applicability of KRS 189A.110 in instances where no blood alcohol test is administered.

The pertinent facts are as follows: Irr was arrested by Newport Police Officer, Michael Henley. At trial, Officer Henley testified that Irr was "highly intoxicated," was staggering, and smelled of alcohol at the time of the arrest. Irr was taken to the police station where he was given a series of sobriety tests. He performed poorly on all of the tests. He was then requested to take a breathalyzer test. Officer Henley testified that Irr refused to take a breathalyzer test on three occasions and was advised of his rights regarding the test. Officer Henley recorded Irr's refusal. Irr was then transferred to the county jail.

Once in jail, Irr asked the deputy jailer, Thomas Bechtol, what would be his bond. Deputy Bechtol testified that he told Irr that the judge would have to set the bond, but usually it was a four-hour stay before release in a breathalyzer refusal situation. Deputy Bechtol further testified that Irr asked for a breathalyzer test but Bechtol said he was not trained to give the test and did not have a testing machine in the jail. Irr was released from jail at approximately 9:00 a.m. after posting bail set by the district court judge.

Irr contends that he was held in jail without bail pursuant to KRS 189A.110 which states; "[a]ny person who is arrested for a violation of KRS 189A.110 and who, upon blood alcohol testing shows a blood alcohol reading above .15 percent shall be detained in custody at least four (4) hours following his arrest." Irr argues that since he did not take a blood alcohol test, he could not be held pursuant to this statute and that had he been released on bond immediately, he could have obtained an independent blood alcohol test to prove his innocence. He argues that the denial of bond in his situation interfered with the preparation of his defense and violated his constitutional right to a fair trial. Additionally, Irr argues that the four-hour hold provision of KRS 189A.110 constitutes a denial of his sixth amendment constitutional right to effec-

tive assistance of counsel at a critical stage of the proceedings against him. He contends that exculpatory evidence in a DUI case must be gathered within the first hour or so of the arrest, thus this is a critical stage in the proceedings.

We disagree and affirm. Common sense indicates that Irr's arguments would make a mockery and a shambles of controlling the privilege of driving by drunk drivers.

Our Supreme Court has held that there is no right to counsel at the time a breathalyzer test is administered. *Newman* v. *Hacker*, Ky., 530 S.W. 2d 376 (1975). Administering the test is not such a critical stage from which counsel's absence might derogate from a defendant's right to a fair trial. Furthermore, we might add that time is of the essence for the Commonwealth as it is for the accused. The blood alcohol tests must be administered promptly. Even if an attorney was called and could attend, he would have to appear quickly.

Irr argues that if he had been released he could have obtained an independent exculpatory blood test. At 3:00 a.m. this is high speculation, but although KRS 189.520(7) provides that a person tested for blood alcohol may obtain an independent test by a physician of his own choosing, *Newman*, *supra*, also held that an individual who refuses to take a breathalyzer test is not entitled to take an independent test. *Newman*, at 377. Under *Newman*, Irr was not entitled to an independent test, and there was no special circumstance to warrant his immediate release or access to an attorney.

There is a dispute concerning Irr's desire to use a telephone. However, we fail to see how Irr's rights to counsel or immediate release were prejudicially violated. His bond was in fact set at $500, but he had no cash. His credit and credit cards were usable by him to obtain release at 9:00 a.m. We fail to understand how he could have been released much quicker.

Further, we agree with the circuit court's conclusion that KRS 189A.110 does not require Irr's release from jail upon his refusal to take a breathalyzer test. The statute allows for holding one charged with DUI for four hours if he/she

registers as much as .15 on the breathalyzer. Logic dictates that if the various sobriety test results indicate probable cause to believe the individual is intoxicated, and if an individual refuses the breathalyzer test, the authorities then can retain custody of the individual.

No individual has a natural and irrevocable "right" to operate a motor vehicle on public roadways. *E.g.*, *Ballow* v. *Reeves*, Ky., 238 S.W. 2d 141 (1951). It is "a privilege granted by a license of the state, subject to reasonable regulations by the state in exercise of its police powers." *Sturgill* v. *Beard*, Ky., 303 S.W. 2d 908, 909 (1957). KRS 189.110 is a reasonable exercise of the police power and it is not unreasonable to apply a four-hour sobriety period to one who has refused the breathalyzer.

In the face of Irr's refusal to submit to the breathalyzer test, we must balance the demands of public safety against an individual's personal liberties. If the authorities have probable cause to believe an individual is unfit to operate a motor vehicle and he refuses the breathalyzer, they may hold him for a reasonable period to regain his sobriety and the four-hour hold of KRS 189.110 is a reasonable period.

The judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

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SUPREME COURT OF KENTUCKY

88-SC-55-D
(86-CA-2821-DG)

WILLIAM IRR

MOVANT

v.

COMMONWEALTH OF KENTUCKY

RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion of the movant for a review of the decision of the Court of Appeals is denied.

ENTERED February 23, 1988.

/s/ ROBERT F. STEPHENS
Chief Justice

CAMPBELL CIRCUIT COURT
DIVISION NO. ONE

NO. 86-X-014

COMMONWEALTH OF KENTUCKY,
Plaintiff/Appellee,

vs.

WILLIAM IRR,
Defendant/Appellant.

JUDGMENT
(Entered October 22, 1986)

Appellant was tried and convicted by a jury in the Campbell District Court of Driving Under the Influence. Defendant has furnished us with a comprehensive and well written memorandum outlining his arguments. The difficulty is that he assumes, and in fact states, that "this Court need not decide whether appellant agreed or refused to take a breathalyzer . . ." We believe that such a determination is of the utmost importance to this appeal and find that, although the defendant maintains that he agreed to take the breathalyzer test, the evidence is overwhelming that he refused the test on three occasions. It should also be noted that the defendant agrees that he had no right to have an attorney present for the administering of the breathalyzer test.

Having found that the defendant did, in fact, refuse to take the breathalyzer test, this case is readily disposed of by *Newman* v. *Hacker*, Ky. 530 SW 2d 376 (1975). Defendant contends that he was denied due process because he was denied counsel. He argues that if he had an attorney present, he could have secured a blood test which would have shown things favorable to him. *Newman* says that the blood test provisions of the statute are not applicable when a defendant refuses a breathalyzer test.

Defendant maintains that K.R.S. 189 (a).110 requires his release from jail if a blood alcohol test is refused. What the statute says is that if the blood alcohol is above .15 that the defendant can be held for four hours. It says nothing about the right of a defendant to immediate release if the test is refused. Simple logic dictates that if the test result shows reason for the authorities to hold a defendant and that if a defendant refuses the test, the authorities then can and should retain custody of the defendant if they have probable cause to believe that the defendant is under the influence. It would product incongruous results if the statute were interpreted to mean that a person being held under probable cause can continue to be held if he submits to a test which confirms the probable cause but *must* be released if the probable cause holding cannot be confirmed due to the refusal of the defendant to submit to the test. Finally, the defendant contends that he was deprived of the right to a blood test. Again, as pointed out above, this is answered by *Newman*.

The Judgment of the lower court is affirmed.

/s/ GEORGE MUHLENKAMP
JUDGE

I, Thomas J. Calme, Clerk of the Campbell County Circuit Court, do hereby certify that a true copy of this Judgment was mailed/hand delivered to Justin Verst, Stephen Schiller and Judge Lambert Hehl, this 22nd day of October, 1986.

/s/ THOMAS J. CALME, Clerk

CAMPBELL DISTRICT COURT
DIVISION NO. TWO

CASE NUMBER 85-T-2956

COMMONWEALTH OF KENTUCKY
PLAINTIFF

vs.

WILLIAM IRR
DEFENDANT

JUDGMENT AND SENTENCE
(Filed June 23, 1986)

It having been brought to the attention of this Court that the Court, on May 14, 1986, entered a "Trial and Verdict" herein, but that it erroneously failed to enter a Judgment and Sentence thereon, it is hereby

ORDERED AND ADJUDGED that, based upon the Verdict of the Jury, Defendant William Irr is hereby adjudged Guilty of the offense of driving while under the influence of alcohol. His sentence is hereby fixed at a fine of $250.00, as well as a service fee of $150.00, and court costs.

/s/ LAMBERT HEHL
JUDGE

cc: Paul Twehues
Steven Schiller

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

ACTION NO. 86-CA-2821-DG
(KENTUCKY SUPREME COURT NO. 88-SC-55-D)
(CAMPBELL CIRCUIT COURT NO. 86-X-014)

WILLIAM IRR

APPELLANT

vs.

COMMONWEALTH OF KENTUCKY

APPELLEE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
(Filed March 25, 1988)

Notice is hereby given that William Irr, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the Decision entered by the Kentucky Court of Appeals dated January 8, 1988, affirming the decision entered in Campbell County Kentucky Circuit Court, Action No. 86-X-014, affirming the conviction of Appellant in Action No. 85-T-2956. The Supreme Court of Kentucky entered an Order dated February 23, 1988 denying discretionary review of said Decision.

This Appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ STEVEN L. SCHILLER
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401 York Street
Newport, KY 41071
(606) 261-6811

CERTIFICATION

I hereby certify that I have mailed a copy of the foregoing to Paul Twehues, Campbell County Attorney, and Attorney for Appellee Commonwealth of Kentucky, The Clerk of the Supreme Court of Kentucky, the Clerk of the Kentucky Court of Appeals, and the Clerk of Campbell County, Kentucky Circuit Court, on this 24th day of March, 1988. I further certify that all parties required to be served have been served.

/s/ STEVEN SCHILLER

I, John C. Scott, Clerk, Court of Appeals, certify that copies of the Notice of Appeal as filed in this Court on March 25, 1988, have been mailed to Frederic Cowan, Paul H. Twehues, Jr., Steven L. Schiller, and Joseph F. Spaniol, Jr., this 29th day of March, 1988.

JOHN C. SCOTT, Clerk
By: /s/ JEANETTE MULLEY
Chief Deputy Clerk

Supreme Court, U.S.
FILED
JUN 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

ACTION NO. 87-1750

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

WILLIAM IRR, JR.,

Appellant

v.

THE COMMONWEALTH OF KENTUCKY,

Appellee.

ON APPEAL FROM
THE KENTUCKY COURT OF APPEALS

MOTION OF APPELLEE TO DISMISS OR AFFIRM

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MOTION OF APPELLEE TO DISMISS OR AFFIRM

Appellee in the above entitled case moves this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Kentucky Court of Appeals on the grounds that:

1. This matter should have been presented to the Court by petition for writ of certiorari pursuant to 28 U.S.C. 1257(3) rather than appeal;

2. That, considering this matter as a writ of certiorari pursuant to 28 U.S.C. 2103, reasonable grounds for granting the writ do not exist; and

3. The question presented is so insubstantial that further argument is unnecessary.

STATUTORY PROVISIONS INVOLVED

As will be discussed at greater length in the following argument, KRS 189A.110 is not an issue in this case. The text of that statute, however, and of other statues and court rules cited in this motion (KRS 186.565(3); 189.520(5); 189.520(7); 189A.010; Kentucky Rules of Criminal

Procedure (RCr) 3.02 and 4.24) have been included in the appendix.

STATEMENT OF FACTS

Appellant William Irr, a resident of Illinois, was arrested for driving under the influence of alcohol in Newport, Kentucky, on August 22, 1985, between 2:30 and 2:45 a.m. Officer Mike Henley had observed Irr weaving back and forth across the center line on a one way street, and watched as Irr made a left turn from the right hand lane of that street. When Irr finally pulled over in response to Officer Henley's flashing light, he drove onto the sidewalk.

Officer Henley detected the odor of alcohol on Irr, and took Irr to the police station before conducting any sobriety tests because the officer felt it would be unsafe to give Irr a field sobriety test at the scene due to Irr's apparent highly intoxicated condition.

At the police station, Irr was observed to be "very unsteady" during a heel-to-toe walking

test, and was unable to touch his finger to his nose with either hand.

Officer Henley testified that he requested Irr to take a breathalyzer test "at least three times". The officer's testimony was that Irr would initially agree to take the test, then refuse to do so after being taken out of the holding cell. Irr told the officer that he'd been arrested for DUI in Illinois and would lose his license.

Irr asked for an attorney, but Officer Henley told him that he did not have to provide one prior to the breathalyzer test, and also that he did not have a telephone book with the phone numbers of local attorneys available at the station.

Irr was then taken to jail. Although he testified at trial that a telephone was not immediately available at that time, the jailer who testified as a defense witness did not testify concerning any request for a telephone call. Deputy Jailer Thomas Bechtol testified that Irr

asked him what his bond would be, and was told that the judge would have to set the bond and that there was normally a four hour stay before release when a DUI arrestee had refused the breathalyzer test. After being told about the four hour stay, Jailer Bechtol testified that Irr at that point said, "Well, I'll take one now." Bechtol informed Irr, however, that he was not trained to give the test and did not have a testing machine at the jail.

Finally, testimony at the trial indicated that Irr did not have any cash with him at the time of his arrest, because money had been taken from his wallet while he was in a bar prior to his arrest.

Irr was convicted of DUI by a jury and sentenced to a fine of $250.00. The Kentucky Court of Appeals rendered an opinion following its discretionary review of this case in which it decided that "it is not unreasonable to apply a four hour sobriety period to one who has refused the breathalyzer." The Supreme Court of Kentucky

thereafter denied discretionary review of the opinion of the Court of Appeals of Kentucky.

ARGUMENT

THE CONSTITUTIONALITY OF KRS 189A.110 IS NOT AN ISSUE IN THIS APPEAL.

Although appellant attempts to argue that KRS 189A.110 was interpreted by the Kentucky Court of Appeals to permit an accused to be held "incommunicado" following the refusal of a breathalyzer test, a careful reading of the lower court's unpublished opinion indicates that its ruling is not nearly so sweeping as appellant suggests.

Although accepting discretionary review on the question of the application of KRS 189A.110, the Court of Appeals in its written opinion did not ultimately rule that KRS 189A.110 mandates a four hour incommunicado stay on one who has refused to take a breathalyzer test. What the Court actually ruled is that it is not unreasonable to apply a four hour sobriety period to one who has refused the breathalyzer; and that

"if the authorities have probable cause to believe an individual is unfit to operate a motor vehicle and he refuses the breathalyzer, they may hold him for a reasonable period to regain his sobriety and the four hour hold of KRS 189A.110 is a reasonable period."

KRS 189A.110 reads as follows:

> Any person who is arrested for a violation of KRS 189A.010 and who, upon blood alcohol testing, shows a blood alcohol reading above .15 percent shall be detained in custody at least four hours following his arrest.

This statute specifically provides for the denial of bail immediately to one who would simply be repeating his crime if he drove his automobile home from the police station. The statute does not prohibit the police and jailers from detaining an individual who is obviously intoxicated simply because he exercises his privilege under Kentucky state law to refuse to take a blood alcohol test requested by a police officer. This is not in conflict with previous opinions by this Court that bail should not be granted if there is danger that

the defendant, if given his freedom, will commit crime of a like character. Carbo v. United States, 82 S.Ct. 662, 7 L.Ed.2d 769 (1962); C.f. United States v. Salerno, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (citing cases indicating that mentally unstable individuals may be detained before trial, or those who present a risk of flight or danger to the community).

The Kentucky Court of Appeals found that it was not unreasonable for a DUI arrestee (who could not even touch his finger to his nose) to be held for a four hour period to regain his sobriety. This was a determination which did not depend upon the constitutionality or unconstitutionality of KRS 189A.110. Since the statute is not truly the issue, appeal is not the proper route for presenting the matter to this Court.

NO REASONABLE GROUNDS EXIST FOR REVIEW OF THIS MATTER PURSUANT TO 28 U.S.C. 2103.

Certain conflicts in the evidence at trial are noted in the opinion of the Kentucky Court of Appeals. Irr is asking this Court to assume

jurisdiction of this matter in order to resolve conflicts in the evidence. This Court should deny the invitation.

At no time during Jailer Bechtol's brief trial testimony did he indicate that Irr asked to contact an attorney after his arrival at the jail, or that he insisted on a blood test rather that a breath test. Jailer Bechtol's testimony was that after Irr had been told that there would normally be a four hour stay following situations where a breathalyzer test has been refused, Irr said, "Well, I'll take one now". Irr asked to take a breathalyzer test, not to have a physician draw a blood sample; Officer Henley testified that Irr had already refused the test three times.

Under Kentucky law, an individual charged with having operated a vehicle while under the influence of intoxicating beverages is entitled to refuse a request by police that he submit to a blood, urine, breath or other test. Such refusal, however, results in the revocation of his license (if a citizen of Kentucky) or privilege to operate

a motor vehicle within this state (if a non resident) for a period of up to six months. KRS 189.520(5). An arrestee is entitled to have a duly licensed physician of his own choosing administer a test "in addition" to the one administered at the direction of the police officer. KRS 189.520(7). Unless the arrestee submits to the test requested by police, however, that section of the statute which permits an "additional" test is not applicable. Newman v. Hacker, 530 S.W.2d 376 (Ky. 1975).

The motorist is not entitled to have counsel present when a breathalyzer test is given. Elkin v. Commonwealth, 646 S.W.2d 45 (Ky. App. 1982); citing United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). Irr expressly conceded this point at page 10 of the brief he filed with the Kentucky Court of Appeals, Case 86 CA 2821 D.

Irr waived his right to an independent blood test, assuming that he wanted one, by refusing three times to take a breathalyzer test.

Under Kentucky law, the officer is only required to make the request twice, with the second request being made after the person is warned of the effect of his refusal to submit to the test. KRS 186.565(3). It was reasonable for the jailers to delay Irr's initial appearance before a judge until Irr had sobered up and was no longer a danger to himself and others. KRS 189A.110 was not cited to Irr as the reason for this delay; he was simply told that the jailers normally held an arrestee for four hours following refusal of a breathalyzer test. Since it was reasonable to delay Irr's release until he had sobered up, since he refused the test requested by Officer Henley, and since he did not request a blood test while at the police station or jail, it cannot be said that he was improperly prevented from being able to obtain a blood test or denied due process of law.

Finally, given Irr's outward appearance of intoxication, it cannot be said that any blood test he could have obtained would have had exculpatory value to him. C.f. California v.

Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)

Pursuant to RCr 3.02, Irr was taken before a judge "without unnecessary delay" at 9:00 a.m. Irr has never shown or alleged that the jailer on duty that morning had been authorized by the chief judge of the circuit court to take bail, or that the clerk of the court was available at an earlier time than the judge. RCr 4.24.

CONCLUSION

For the foregoing reasons, the appeal docketed by William Irr should be dismissed. In the alternative, the opinion of the Kentucky Court of Appeals should be affirmed. Irr was detained for a reasonable length of time in which to sober up prior to his initial appearance before a judge for release on bail and, as the Kentucky Court of Appeals noted in its opinion (copied in Jurisdictional Statement, p. 3a), it is difficult to understand how he could have been released much quicker. No substantial federal question has been presented to this Court, and the matter should be

dismissed or the lower court judgment affirmed without further argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As a member of the Bar of the United States Supreme Court, the undersigned hereby certifies that on the 9th day of June, 1988, three copies of the foregoing Motion of Appellee to Dismiss or Affirm were mailed, first class postage prepaid, to Honorable Steven L. Schiller, Campbell Towers, 6th Floor, 401 York Street, Newport, Kentucky 41071, Counsel for Appellant.

Valerie L. Salveson
Assistant Attorney General

APPENDIX

KENTUCKY RULES OF CRIMINAL PROCEDURE
(RCr)

RCr 3.02
Initial appearance before the judge

(1) An officer making an arrest under a warrant issued upon a complaint shall take the arrested person without unnecessary delay before a judge as commanded in the warrant. If the arrest is made in a county other than that in which the warrant was issued and the arrested person is not taken as commanded in the warrant, he shall be taken before a judge of the county in which the arrest is made, who shall consider the defendant for release on personal recognizance and so release him or admit him to bail for his appearance before the proper judge to whom the bail bond and other papers may be transmitted by mail. If the offense is nonbailable, or if the person arrested is unable to give bail, the judge shall commit him to jail and he shall be taken as commanded in the warrant within a reasonable time by an officer of the county in which it was issued.

(2) Any person making an arrest without a warrant shall take the arrested person without unnecessary delay before a judge, and shall file with the court a post arrest complaint specifying the offense for which the arrest was made and the essential facts constituting probable cause on which the complaint is based. Such complaint need not be verified but shall be signed by the person making the arrest. If the judge before whom the arrested person is taken is in a county other than the county in which the offense was committed, the judge shall proceed as directed in paragraph (1) of this Rule 3.02 as on an arrest under warrant in a county other than that in which the warrant was issued.

(3) If no judge is available in the county in which the arrest was made the defendant shall be taken to jail, and any documents relating to

the arrest shall be given to the jailer. If the defendant is ineligible to post bail under Rule 4.20 or cannot make the bail endorsed on the arrest warrant, the jailer shall take him before the judge without unnecessary delay.

(4) Any documents relating to the arrest that are in the possession of the jailer shall be delivered to the clerk on or before the next business day.

RCr 4.24
Officers authorized to take bail

When the amount of bail has been fixed either by the court or by the uniform schedule of bail, it may be taken by the clerk of the court in which the defendant is held to appear. Any other bonded public officer may be authorized by the chief judge of the circuit court to take bail, but only if the clerk of the court is unavailable. The individual with whom deposits are made shall ascertain that the amount deposited is no less than the amount fixed by the court.

KENTUCKY REVISED STATUTES
(KRS)

KRS 186.565 Consent to test for alcohol in blood; procedure upon refusal; ruling; judicial review; exception; application to court to enter driver's education program

(3) If a person under arrest refuses upon the request of a law enforcement officer to submit to a test designated by the law enforcement agency as provided in subsection (1) of this section, the requesting officer shall warn the person of the effect of his refusal to submit to the test. If the person again refuses, none shall be given, but the transportation cabinet, upon the receipt of a sworn report of the law enforcement officer that he had reasonable grounds to believe the arrested person had been driving or was in actual physical

control of a motor vehicle in this state while under the influence of intoxicating beverages or other substances which may impair one's driving ability, that the person refused to submit to the test upon the request of the law enforcement officer, and that the person again refused to submit to the test after the law enforcement officer warned him of the effect of his refusal, the cabinet shall immediately serve notice upon said person in writing by mailing the notice to the person by certified mail to the last known residence address of the person or if the address is unknown, to the last known business address of the person to appear before the secretary or his duly authorized agent and show cause why his license to operate a motor vehicle, or if said person is a nonresident his privilege to operate a motor vehicle within this state should not be revoked; or if the person is a resident without a license or permit to operate a motor vehicle in this state why that person should not be denied the issuance of a license or permit. The hearing shall be scheduled as early as practical but not sooner than ten (10) days after the issuance of the notice and at a time and place designated by the secretary.

KRS 189.520 Operating vehicle while under influence of intoxicants or substance which may impair driving ability prohibited; presumptions concerning intoxication

(5) No person may be compelled to submit to any test specified in subsection (3) of this section, but his refusal to submit to such a test shall result in revocation of his license as provided in KRS 186.565(3).

(7) The person tested shall be permitted to have a duly licensed physician of his own choosing administer a test in addition to the one administered at the direction of the police officer.

KRS 189A.010 Operating motor vehicle while under the influence of alcohol or other substance which may impair driving ability prohibited; penalties

(1) No person shall operate a motor vehicle anywhere in this state while under the influence of alcohol or any other substance which may impair one's driving ability.

(2) Any person who violates the provisions of subsection (1) of this section shall:

(a) For the first offense, be fined not less than two hundred dollars ($200) nor more than five hundred dollars ($500) or be imprisoned in the county jail for not less than forty eight (48) hours nor more than thirty (30) days or both. Following sentencing, the defendant may apply to the judge for permission to enter a community labor program for not less than two (2) days nor more than thirty (30) days in lieu of fine or imprisonment, or both, provided that his offense does not come within the purview of subsection (4) of this section.

(4) When sentencing persons convicted of violating subsection (2)(a) of this section at least one (1) of the penalties shall be assessed and that penalty shall not be suspended, probated, or subject to conditional discharge or other form of early release. If a person other than the person convicted of violating subsection (1) of this section dies or has suffered physical injury, as defined in KRS 500.080, as a result of the convicted person's operation of a motor vehicle in violation of subsection (1) of this section, the sentence shall include imprisonment as specified in subsection (2)(a) of this section and that portion of the sentence shall not be suspended, probated, or subject to conditional discharge or other form of early release.